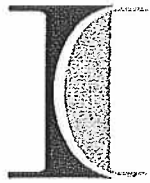


Exhibit I



AMERICAN IMMIGRATION COUNCIL

COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

April 27, 2012

U.S. Immigration and Customs Enforcement
Office of Principal Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Office
500 12th Street, S.W. STOP 50009
Washington, D.C. 20536-5009

Re: **FOIA Appeal**
ICE FOIA Case Numbers 2011FOIA7112 and 2012FOIA8229;
OPLA11-256

Dear Sir or Madam:

The American Immigration Council (AIC) is in receipt of a March 1, 2012 letter from the ICE FOIA office, acknowledging receipt of AIC's March 11, 2011 FOIA request. ICE has neither granted nor denied this request, in violation of the time period for response set forth in 5 U.S.C. § 552(a)(6)(A)(i). In addition, ICE has implicitly denied AIC's fee waiver request. Please consider this letter an appeal of the constructive denial of AIC's FOIA request and fee waiver request.

Procedural History of FOIA Request

AIC submitted a FOIA request to ICE on March 14, 2011 (attached hereto as Exhibit A), which sought any and all records which have been prepared, received, transmitted, collected, or maintained by the U.S. Department of Homeland Security and/or ICE (including any of its subdivisions) that relate in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with ICE;
- What role attorneys may play during their clients' interactions with ICE;
- Attorney conduct during interactions with ICE on behalf of their clients;
- Attorney appearances at ICE offices or other facilities.

AIC's letter also sought a waiver of all fees associated with the FOIA request because disclosure of the information AIC sought would be "likely to contribute significantly to public understanding of the operations or activities of the government and is not

primarily in the commercial interest of" AIC, which is a tax-exempt charitable and educational institution.

AIC received two letters dated March 31, 2011 from ICE FOIA Officer Catrina M. Pavlik-Keenan acknowledging receipt of its request (attached hereto as Exhibits B and C). One of the letters stated that ICE would "charge [AIC] for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters." The other stated: "As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records." Neither letter provided any substantive response to AIC's request for records.

ICE provided no further response to AIC's request within the twenty days allowed under 5 U.S.C. § 552(a)(6). AIC construed the lack of response as a constructive denial of its request and filed an administrative appeal on August 11, 2011. In response to the appeal, the Office of the Principal Legal Advisor (OPLA) informed AIC by letter dated September 23, 2011 (attached hereto as Exhibit D) that certain ICE divisions now had been assigned to conduct searches for responsive records. Specifically, the ICE FOIA office had tasked OPLA, the Office of Enforcement and Removal Operations (ERO), and Homeland Security Investigations (HSI) to conduct searches responsive to the request. Because the case was "being processed in the order it was received" and any responsive documents would be "processed according to the FOIA upon receipt from the program office," ICE closed the appeal as moot.

Only four days after notifying AIC that the appeal was closed, the FOIA office issued a letter (dated September 27, 2011) stating that ICE was not able to locate any records responsive to AIC's original FOIA request (attached hereto as Exhibit E). That letter, signed by FOIA Officer Catrina M. Pavlik-Keenan, states that "ICE has conducted a comprehensive search of files within the ICE Office of Enforcement and Removal Operations (ERO), the Office of Homeland Security Investigations (HSI) and the ICE Office of the Principal Legal Advisor (OPLA)" for records responsive to AIC's FOIA request, but that these divisions "were unable to locate or identify any responsive records."

AIC subsequently appealed this adverse determination (attached hereto as Exhibit F). In this appeal, AIC argued that ICE did not conduct an adequate search for responsive records, as required by 5 U.S.C. § 552(a)(3). ICE not only failed to conduct searches in all of the offices specifically named in the request, but ICE's failure to uncover any responsive records -- particularly in light of the range of specific types of records requested and the nature of ICE's functions and duties -- demonstrated that the search was inadequate. On February 29, 2012, OPLA issued a response to this appeal (attached hereto as Exhibit G), in which it remanded the request to the ICE FOIA office for reprocessing. On March 1, 2012, the FOIA office issued a letter, signed by FOIA Officer Catrina M. Pavlik-Keenan (attached hereto as Exhibit H), indicating that it had received AIC's request and that it is invoking a ten day extension for responding to the request under 5 U.S.C. § 552(a)(6)(B). The letter also states that AIC will be charged for duplication costs, at the non-commercial requestor rate, and search fees.

I. ICE FAILED TO RESPOND TO AIC'S MARCH 14, 2011 FOIA REQUEST.

When a party submits a FOIA request, the agency has 20 business days to determine whether to produce records responsive to the request. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, this deadline may be extended for a maximum of ten additional business days. 5 U.S.C. § 552(a)(6)(B)(i). When an agency fails to meet the response times required by FOIA, requesting parties may deem the agency's delay a denial of the FOIA request and appeal the denial. *See, e.g., Ruotolo v. Dep't of Justice*, 53 F.3d 4, 8 (2d Cir. 1995) ("[A]dministrative remedies are 'deemed exhausted' if the agency fails to comply with the 'applicable time limit' provisions of the FOIA."); *Voinche v. Fed. Bureau of Investigation*, 999 F.2d 962, 963 (5th Cir. 1993) ("If an agency has not complied within the statutory time limits of a FOIA request, the requestor shall be deemed to have exhausted his administrative remedies and [may] bring suit."). ICE has failed to respond to AIC's FOIA request within the twenty days provided under the FOIA statute and within the ten additional days that it invoked pursuant to 5 U.S.C. § 552(a)(6)(B).

FOIA incorporates a strong presumption in favor of mandatory disclosure of requested records. *Wisconsin Project on Nuclear Arms Control v. Dep't of Commerce*, 317 F.3d 275, 279 (D.C. Cir. 2003) ("FOIA accordingly mandates a 'strong presumption in favor of disclosure.'") (quoting *Dep't of Justice v. Ray*, 502 U.S. 164, 173 (1991)). Agencies may deny a FOIA request only when the requested records fall under any of the nine exemptions listed in FOIA. 5 U.S.C. § 552(b)(1)-(9). ICE has not responded to AIC's FOIA request and thus has not applied any of the statutory exemptions to withhold the records requested. Accordingly, AIC is entitled to the requested records.

II. AIC IS ENTITLED TO A FEE WAIVER.

Under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), a fee waiver is to be granted when "(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester." 6 C.F.R. § 5.11(k). AIC's request meets both requirements, and in the event responsive records are located, AIC will be entitled to a fee waiver.

A. Disclosure of the Information Is In the Public Interest.

DHS considers four factors, set forth in 6 C.F.R. § 5.11(k), when determining whether disclosure of requested information is in the public interest:

- (1) "Whether the subject of the requested records concerns 'the operations or activities of the government,'"
- (2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"

- (3) “Whether disclosure of the requested information will contribute to ‘public understanding’” as opposed to the individual understanding of the requester; and
- (4) “Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

As set forth below, AIC meets all four requirements.

1. *The subject of the requested records concerns the operations and activities of the government.*

The records AIC seeks plainly concern the operations and activities of the government. ICE is a component of the U.S. Department of Homeland Security, a cabinet-level department of the federal government. It is responsible for enforcement of federal immigration law, including investigation, apprehension, and removal of removable noncitizens. The records AIC seeks relate to ICE’s policies in connection with noncitizens’ access to counsel in interactions with the agency. Such interactions are very clearly “operations and activities” of the government.

2. *Disclosure is likely to contribute to an understanding of government operations or activities.*

Disclosure of the records sought by AIC’s request will contribute to a deeper understanding of the role of counsel before ICE.

AIC’s Immigration Policy Center (IPC) and Legal Action Center (LAC) reach out to lawyers and the general public to promote a better understanding of immigration law, policy, and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs, and crime), and regularly provides information to leaders on Capitol Hill and the media. See www.immigrationpolicy.org. The LAC works with other immigrants’ rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. See www.legalactioncenter.org. Relevant to this FOIA request, the LAC has historically focused on access-to-counsel issues. Specifically, the LAC provides education about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the harms of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security.

Beyond the limited documents available on ICE’s website and the INS Examinations Handbook, AIC is not aware of any publicly available documents explaining how and why ICE limits access to counsel in various settings. Release of such documents will significantly increase understanding of ICE’s policies involving counsel.

3. *Disclosure will contribute to public understanding of government operations or activities.*

Disclosure of the requested information will also contribute to “public understanding,” as opposed to the understanding of a narrow segment of interested persons. Release of the information to AIC will significantly advance the general public’s understanding of ICE’s policies toward counsel. AIC has the capacity, legal expertise, and intention to review, analyze, and synthesize this information and make it accessible to a broader public audience. In addition to providing all released information on its website, AIC plans to draft one or more summary reports on the records received in response to its FOIA request.

AIC has the intention and capacity to disseminate such reports by posting them on the AIC website, which contains immigration-related information and news, and is accessible by any member of the public. AIC’s website receives more than 115,000 monthly pageviews (or 1.5 million yearly pageviews) and information available on the website is regularly shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will publish the summary reports in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC has regular contact with national print and news media and plans to continue to share information gleaned from FOIA disclosures with interested media.

4. *Disclosure of the requested information will contribute significantly to public understanding of noncitizens’ access to counsel in interactions with ICE.*

Disclosure of the requested information will contribute significantly to public understanding of ICE practices related to noncitizens’ access to legal counsel. This issue is of sufficient importance that a federal regulation, 8 C.F.R. § 292.5(b), has been adopted to address the role of counsel before ICE and other agencies.

Interviews and interactions with ICE officers can be intimidating and confusing, and noncitizens often seek assistance from attorneys to help navigate these encounters. Detention in ICE facilities deprives noncitizens of their liberty and threatens other legal interests, and detainees’ access to counsel is according crucial. It is vitally important that noncitizens and attorneys alike understand when and for what reasons access to counsel may be limited before ICE. In addition, U.S. citizens may be subject to the same treatment as noncitizens if an ICE officer questions their citizenship. Citizens accordingly have an equally important stake in understanding ICE policies related to counsel.

The records sought by AIC’s FOIA request will inform noncitizens at risk of removal from the United States, noncitizens in ICE custody, the attorneys who represent them, and other members of the public who are concerned with the fairness of immigration agency proceedings and policies. Because there is no publicly available comprehensive ICE guidance governing attorney representation and conduct, the dissemination of these records will significantly improve public understanding of the scope of representation

permitted before ICE. The disclosure and dissemination of the requested records also may help explain disparate treatment by ICE of attorneys and their noncitizen clients throughout the country. Finally, this information will inform nonprofit and international organizations interested in the treatment of noncitizens in proceedings before ICE.

B. Disclosure of the Requested Information is Not Primarily in the Commercial Interest of the Requester.

DHS considers two factors, set forth in 6 C.F.R. § 5.11(k)(2), when determining whether disclosure of requested information is primarily in the commercial interest of the requester:

- (1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure"; and
- (2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the public and not for any commercial gain. The LAC has a long record of administrative advocacy concerning issues related to counsel in immigration proceedings. Like all other reports and information available on the AIC website, information about counsel received in response to AIC's FOIA request will be widely distributed to immigration attorneys, noncitizens, and other interested members of the public free of charge. Given that FOIA's fee waiver requirements are to be "liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified in this case. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

Please provide a response to this appeal within the twenty days allowed by 5 U.S.C. § 552(a)(6)(A)(2). Thank you for your attention to this matter, and please do not hesitate to contact me if you have questions or would like clarification of any of the requests above.

Very truly yours,



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